

**IN THE MISSOURI CIRCUIT COURT
FOR THE NINETEENTH JUDICIAL CIRCUIT
COUNTY OF COLE**

MARY DOE,)	
)	
Plaintiff,)	
)	
v.)	Case No. 15AC-CC00205
)	Hon. Jon E. Beetem
JEREMIAH JAY NIXON,)	
GOVERNOR OF THE STATE OF)	
MISSOURI,)	
)	
and)	
)	
CHRIS KOSTER, ATTORNEY)	
GENERAL FOR THE STATE OF)	
MISSOURI,)	
)	
Defendants.)	

**DEFENDANTS' MOTION TO DISMISS AMENDED PETITION
WITH PREJUDICE FOR FAILURE TO STATE A CLAIM**

Defendants Jeremiah Nixon, Governor of the State of Missouri, and Chris Koster, Attorney General for the State of Missouri, (collectively, “the State”) move this Court under Rule 55.27 for an order dismissing Plaintiff’s Amended Petition for failure to state a claim on which relief can be granted. As Plaintiff was permitted to amend her pleadings once already following dismissal of her original petition for failure to state a claim, the State respectfully asks that her Amended Petition be dismissed *with prejudice*.

WHEREFORE, Defendants request that the Amended Petition be dismissed *with prejudice* for failure to state a claim on which relief can be granted.

Date: February 22, 2016

Respectfully submitted,

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**SUGGESTIONS IN SUPPORT
OF DEFENDANTS’ MOTION TO DISMISS AMENDED PETITION
WITH PREJUDICE FOR FAILURE TO STATE A CLAIM**

This is Plaintiff’s second attempt to invalidate several provisions of Missouri law regulating abortion as contrary to the Religious Freedom Restoration Act (RFRA), § 1.302 RSMo.¹ The Court dismissed Plaintiff’s first attempt on December 24, 2015, concluding that her “pleadings fail to allege facts, which if true, state a claim for relief under the RFRA.” Judgment at *1. Although the number of paragraphs and counts has changed, Plaintiff’s

¹ All statutes cited in these suggestions refer to the Missouri Revised Statutes (2015 Supp.) unless stated otherwise.

Amended Petition challenges the *same* statutory provisions and alleges the *same* facts this Court has already ruled insufficient as a matter of law. For the same reasons set forth in the Court’s prior Judgment, Plaintiffs’ Amended Petition should be dismissed *with prejudice*.

Plaintiff’s Amended Factual Allegations

Mary Doe (“Plaintiff”) is a mentally competent adult who resides in Greene County, Missouri. Am. Pet. ¶¶1, 33. When she learned she was pregnant in March 2015, Plaintiff began making plans to have an abortion at Planned Parenthood in St. Louis, the only abortion facility in Missouri. *Id.* ¶¶11, 27. Plaintiff learned that Missouri law required Planned Parenthood to provide her with a booklet on fetal development (“Booklet”) as well as an opportunity to view an ultrasound of her fetus and hear its heartbeat if audible (“Ultrasound Opportunity, all at least 72 hours before performing her abortion (“Waiting Period”). *Id.* ¶¶28-30. The cost of obtaining an abortion, round-trip travel from Greene County, and lodging in St. Louis during the waiting period was equal to 45 hours’ worth of Plaintiff’s wages. *Id.* ¶¶38-40.

The Booklet Missouri law requires Planned Parenthood to provide Plaintiff details fetal development at two-week intervals and includes the following statements: “The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being.” *Id.* ¶¶24. Plaintiff interprets these statements as promoting a religious

doctrine she does not believe. *Id.* ¶¶24, 41.

Plaintiff has the following deeply held convictions regarding abortion:

- a. Her body is inviolable and subject to her will alone;
- b. She must make decisions regarding her health based on the best scientific understanding of the world, even if the science does not comport with the religious or political beliefs of others;
- c. When pregnant, a non-viable fetus is part of her body and not a separate, unique, living human being;
- d. She alone decides whether, when and how to remove a non-viable fetus from her body;
- e. She may, in good conscience, have an abortion without regard to the current or future condition of her non-viable fetus;
- f. She must not support religious, philosophical, or political beliefs that imbue her fetus with an existence separate, apart, or unique from her body;
- g. She must not support any religious, philosophical, or political beliefs that cede to a third party control of the removal of her fetus; and
- h. She must not support any religious, philosophical, or political belief that promotes the idea her non-viable fetus is a human being or imbued with an identity separate, apart, and unique from her body.

Am. Pet. ¶13.

Plaintiff traveled to St. Louis by bus on March 7, 2015, and requested an abortion at Planned Parenthood on March 8. *Id.* ¶¶43-44. Plaintiff informed Planned Parenthood in writing of her deeply held convictions regarding abortion and purported to “absolve [Planned Parenthood] of any responsibility [it] may have” both to provide her the Booklet and the

Ultrasound Opportunity, or to wait 72 hours before performing her abortion. *Id.* ¶¶44-46. Nonetheless, Planned Parenthood refused to perform Plaintiff’s abortion until (a) she acknowledged receipt of the Booklet and the Ultrasound Opportunity in writing, and (b) waited 72 hours. *Id.* ¶47.

Because she could not obtain an abortion in Missouri otherwise, Plaintiff acknowledged receipt of the Booklet, declined the Ultrasound Opportunity, and checked into a motel for the duration of Waiting Period. *Id.* ¶¶48-52. Plaintiff felt guilt and shame during the Waiting Period. *Id.* ¶¶51-52. She returned to Planned Parenthood on May 12, 2015, and terminated her pregnancy. *Id.* ¶53.

Motion to Dismiss Standard

“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition. It assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.” *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329-30 (Mo. 2009). In other words, “the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.” *Id.*

Argument

Once again, it is important to distinguish the causes of action Plaintiff *does not assert* in her Amended Petition from those she does. Plaintiff does not claim that any provision of § 188.027 violates the Establishment, Free Exercise, or Due Process Clauses of the United States Constitution or their counterparts in the Missouri Constitution. Nor does Plaintiff claim that any provision of § 188.027 invades her constitutional right to privacy or imposes a substantial burden on her right to an abortion under *Roe v. Wade*, 410 U.S. 113 (1973) and subsequent Supreme Court case law.

Rather, Plaintiff asserts that portions of § 188.027 impose “a restriction on her free exercise of religion” in violation of her *statutory* rights under the Missouri RFRA. Am. Pet. ¶¶57-81. To state a claim under RFRA, a plaintiff must allege that a governmental authority has restricted or is restricting her free exercise of religion. RFRA defines “exercise of religion” as any “*act or refusal to act*” that is “substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.” § 1.302.2 (emphasis added).

The Amended Petition fails to state a claim under the Missouri RFRA because Plaintiff has not alleged that Missouri law prohibited her from engaging in any “act” or punished her for any “refusal to act” that were “substantially motivated by [Plaintiff’s] religious belief.”

A. Counts I and II fail to state a claim on which relief can be granted.

Count I challenges § 188.027.1(4), which requires that “a qualified professional shall provide the woman with the opportunity to view . . . an active ultrasound of the unborn child and hear the heartbeat of the unborn child if the heartbeat is audible.”² Plaintiff alleges that no medical purpose was served by the Ultrasound Opportunity mandate. Am. Pet. ¶¶58-59. She asserts that Missouri law requires the Ultrasound Opportunity in order to engender feelings of doubt, guilt, and shame in a woman seeking an abortion and to promote a “religious belief” that life begins at conception. *Id.* ¶60. Plaintiff argues that the Ultrasound Opportunity “restricted Plaintiff’s free exercise” because it “subjected her body to the will of Planned Parenthood and the State of Missouri”; was “irrelevant to Plaintiff’s health, based on the best scientific understanding of the world”; was “irrelevant to [her decision to abort] because she could, in good conscience, have an abortion without regard to the current or future condition of her [fetus]”; “enabled the State of

² Plaintiff appears to allege that she was forced to have an ultrasound even though she declined the opportunity to view it. *See* Am. Pet. ¶¶29, 35, 37b, 47b, 54b, 58. The plain language of the statute mandates only “an *opportunity to view* . . . an active ultrasound of the unborn child and hear the heartbeat . . . if . . . audible.” *Id.* (emphasis added). It does not mandate that an ultrasound actually be performed. In 2014, a bill was introduced in the General Assembly that would have made the ultrasound mandatory, but it did not pass. *See* HB 1379 (98th Gen. Assemb.)(proposing to amend “*shall provide the woman with the opportunity to view* . . . an active ultrasound” to “*shall conduct* . . . an active ultrasound”)(emphasis added).

Missouri to decide, for no legitimate medical or other reason, when and how Plaintiff would get an abortion”; and “required Plaintiff to devote time to and pay the expense of a service that was irrelevant and unnecessary” in order to promote the State’s “religious” belief that life begins at conception, to persuade Plaintiff to agree with that assertion, and to cause guilt and shame in Plaintiff for having an abortion. Am. Pet. ¶63.

Count II challenges § 188.027.1(2), which prohibits elective abortion unless “a qualified professional has presented the woman, in person, printed materials provided by the department, . . . [that] prominently display the following statement: ‘The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being.’ ” Plaintiff asserts there is no medical purpose served by receiving a Booklet containing this State speech. Its real purpose, Plaintiff asserts, is to promote the State’s *religious* belief as to when life begins, to persuade pregnant women to adopt that religious belief, and to make them feel doubt, shame, and guilt for having an abortion. Am. Pet. ¶¶ 67-71.

Neither Count I nor Count II states a claim under Missouri law. RFRA allows a plaintiff to seek a court order exempting her from performing *any act* required by law (or permitting her to perform *any act* prohibited by law) where her performance of the required *act* (or her failure to perform the prohibited *act*) would violate a deeply held religious belief. In *Burwell v.*

Hobby Lobby Stores, Inc., for example, the Supreme Court held HHS regulations requiring employers to pay for contraceptive coverage for their employees imposed a substantial burden on the religious exercise of a closely held corporation's sole shareholders whose religious beliefs prohibit the use of contraceptives. 134 S. Ct. 2751, 2779 (2014).

Nowhere in her Petition has Plaintiff alleged that Missouri proscribes any "*act or refusal to act*" that is "substantially motivated by religious belief." Neither the Ultrasound Opportunity nor acknowledging receipt of the Booklet forced Plaintiff to perform any *act* prohibited by a deeply held religious belief. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972)(Wisconsin's compulsory school attendance law unduly burdened Amish family's belief that attending public school endangered their standing in religious community as well as their salvation and that of their children). Nor did the Ultrasound Opportunity or acknowledging receipt of the Booklet prohibit Plaintiff from *performing any act* substantially motivated by a deeply held religious belief. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (Controlled Substances Act's prohibition on use of Schedule I hallucinogenic chemicals unduly burdened religious sect's ritual use of sacramental tea containing the prohibited chemicals).

Plaintiff suggests that being given an opportunity to view (and hear) an ultrasound and having to acknowledge receipt of the Booklet forced her to

spend time and money on a service that was “irrelevant and unnecessary” to her decision to terminate her pregnancy. Am. Pet. ¶63. But Plaintiff does not claim a deeply held religious belief *against complying with “irrelevant and unnecessary” regulations*. Rather, she claims the regulations are irrelevant and unnecessary because they were motivated by a religious belief she does not share. Even assuming Plaintiff could prove the challenged provisions in § 188.027 were actually motivated by a *religious* belief, the only thing that matters for RFRA purposes is the *act* the law requires or prohibits. The only “act” Plaintiff was required to do under the statutory provisions challenged in Counts I and II was *to be present* when a third party made certain information available to her. She did not have to avail herself of that information *or even read it*. She merely had to acknowledge that the third party had complied with *its* statutory obligations.

Plaintiff was not required to accept *or even read about* any particular religious belief (or religious belief in general) to obtain her abortion. Nor was her abortion conditioned on her rejection of any particular religious belief (or religious belief in general). At worst, Missouri created an opportunity—but not an obligation—for Plaintiff to hear State speech regarding abortion. Such requirements do not offend RFRA. *O Centro Espirita* held that Congress could not prohibit the *use* of hallucinogenic drugs as part of a religious sacrament, but the Court has never held Congress cannot mandate that the

sale of those drugs be accompanied with State speech on the dangers of their use. Under Plaintiff's interpretation of RFRA, state-mandated warning labels on cigarettes and alcohol would violate the religious freedom of anyone with a deeply held belief that smoking or drinking is bad for one's health.

Essentially, Plaintiff argues that RFRA permits her to ignore any law she suspects is *motivated* by a religious belief she does not share. But whose belief would that be? The Senator who introduced the bill? The majority belief in the General Assembly? RFRA claims turn on the religious beliefs of *the plaintiff*, not on what the plaintiff alleges are the religious beliefs of the legislators who enacted the challenged statute. Plaintiff is merely cloaking her political beliefs in the mantle of religious faith in order to avoid laws of general applicability she finds imprudent or offensive. Instead of being a safety hatch to protect minority religious beliefs from the tyranny of the majority, Plaintiff's interpretation of RFRA would establish a Get Out of Jail Free card.

Counts I and II should be dismissed with prejudice.

B. The Waiting Period to obtain an abortion does not violate Plaintiffs' religious freedom.

Count III challenges § 188.027.3 and § 188.027.12, which provide that the mandates challenged in Counts I and II (Ultrasound Opportunity and Booklet) must be satisfied at least 72 hours (or 24 hours, if the 72-hour

provision is invalidated) before the abortion is performed. Plaintiff argues that the 72-hour waiting period serves no legitimate medical purpose. Am. Pet. ¶75. She contends its sole purpose is to promote a religious belief that life begins at conception, to punish those who do not share that belief with feelings of guilt and shame. *Id.* ¶76.

Plaintiff alleges that the waiting period violated her exercise of religion because it subjected her body to the will of the State of Missouri; was irrelevant to her health, based on the best scientific understanding in the world; was irrelevant to the abortion procedure since she believes she can have fetal tissue removed without regard to its present or future condition; enabled the state of Missouri to decide how and when Plaintiff would get an abortion; required Plaintiff to expend resources for lodging that was irrelevant and unnecessary for Plaintiff's own beliefs; and forced her to devote time to considering State speech regarding when life begins. *Id.* ¶79.

None of the allegations in Count III identify a single act substantially motivated by Plaintiffs' religious beliefs or a single refusal to act substantially motivated by Plaintiffs' religious beliefs. Plaintiff does not allege any deeply held religious belief that an abortion must be performed in a single doctor visit, or that she cannot miss more than one day of work to have a medical procedure, or that she cannot be given an opportunity to read State speech or see an ultrasound—neither of which she is ever required to

do. All Plaintiff has alleged is that the Waiting Period required by § 188.027 was *unnecessary* and *irrelevant* to her decision to have an abortion.

Complying with laws of general applicability does not violate Missouri's Religious Freedom Restoration Act simply because the person complying believes the law to be irrelevant or unnecessary. At worst, the provisions challenged in Count III caused Plaintiff's abortion to occur at an inconvenient time and place. RFRA does not create a cause of action to enjoin irrelevant, unnecessary, or inconvenient regulations.

Count III should be dismissed with prejudice.

CONCLUSION

Plaintiff doesn't allege that she was substantially motivated by her religious beliefs to seek an abortion. Nor does she allege that she was substantially motivated by her religious beliefs to do so within 72 hours of deciding to end her pregnancy. Plaintiff merely alleges that she *disagrees with* the content of certain State speech about abortion and finds the waiting period irrelevant, unnecessary, and inconvenient. But even assuming Plaintiff's disagreement with State speech is substantially motivated by her religious beliefs, her disagreement is neither an *act* nor a *failure to act*.

Unlike *Hobby Lobby*, which alleged that federal regulations required its shareholders to purchase products prohibited by their religious beliefs (namely, buying contraceptive coverage for their employees), the Plaintiff in

this case does not identify any *act* required under Missouri law but prohibited by her religious beliefs, nor any act prohibited under Missouri law but required by her religious beliefs. At most, she has identified acts required of third parties that may be irrelevant or unnecessary to Plaintiff's religious beliefs. Her RFRA claims fail as a matter of law.

WHEREFORE, the State requests the Amended Petition be dismissed with prejudice.

Date: February 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of February 2016, the foregoing was filed on the Court's ECF system, which has delivered electronic notice of this filing to the following:

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